IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

LORI PHIPPIN	:	
	:	**C.A.#04-03-201**
Plaintiff,	:	
	:	
v.	:	
	:	
DELMARVA MOTOR ACCEPTANCE CORP., THE CAR STORE and PREMIER SERVICE CONTRACT, LLC	:	
	:	
Defendants.	:	

Submitted: December 22, 2005
Decided: January 27, 2006

Gerard F. Gray, Esquire, attorney for Lori Phippin
Patrick E. Vanderslice, Esquire, attorney for Delmarva Motor Acceptance Corp., The Car Store and Premier Service Contract, LLC.

DECISION AFTER TRIAL

In this action the Court is called upon to determine whether the Defendants are liable to the Plaintiff for damages that she incurred as a result of problems with a 1996 Ford Escort and service warranty that she purchased from the Defendants. The Court is also asked to determine whether the Defendants are entitled to a deficiency judgment for its security interest in the Escort. The Court conducted a trial and took testimony and evidence on October 26, 2005. After the Plaintiff presented its case in chief, the Defendants moved for directed verdict. The Court reserved decision. At the close of the Defendants' case, the parties agreed to submit their legal arguments with respect to the Defendants' motion for directed verdict and their closing arguments in writing. This is the Court's decision after reviewing the evidence presented at trial and counsels' briefs.

FACTS

The Court relies heavily on the parties' stipulated facts, jointly submitted exhibits and the uncontested testimony of the Plaintiff in making the following findings of fact. On March 25, 2002, the Plaintiff entered into a retail installment contract and security agreement with The Car Store for the purchase of a 1996 Ford Escort. At the time of purchase, the Escort's odometer reading was 102,929 miles. Additionally, the Plaintiff purchased a service warranty agreement with Premier Service Contract, LLC ("Premier"). The Plaintiff agreed to pay $6,495.00 for the vehicle and $795 for the service contract. She put $900 down on the loan and financed the remaining balance of $6,918.75 through The Car Store. The Plaintiff diligently paid each installment under the contract from the date of purchase until February of 2003. She also paid for service work that was not covered by her service warranty agreement.

The Escort properly worked for about one and one half months after the Plaintiff purchased it. During that time the Plaintiff put an average of 2,250 miles on the vehicle each month. In May of 2002 the Plaintiff attempted to start the Escort in a parking lot but it would not start. Thereafter, the Plaintiff contacted a sales representative at The Car Store and the agent agreed to have the vehicle towed to The Car Store for assessment and possible repair. A jointly submitted invoice from The Car Store, dated May 28, 2002, indicates that the Escort underwent substantial repairs at that time, including total replacement of the engine. (Ex. 5.) The Plaintiff was unable to use the Escort for approximately four to five days at that time and The Car Store lent her a substitute vehicle. The Plaintiff paid the deductible, plus the cost of uncovered expenses.

Approximately one to two weeks after The Car Store replaced the engine, the Plaintiff again took the Escort to The Car Store because the "check engine" light was on. The Car Store fixed the problem.

In June of 2002, the Plaintiff experienced a new problem whereby the vehicle was shaking and making strange noises. She again took the vehicle to The

Car Store. The Car Store representative, Ed Shockley, first told her that the problem was merely related to the fact that she had a new engine. Later, he told her that the vehicle was experiencing transmission problems. A jointly submitted invoice dated June 14, 2002 indicates that The Car Store completed transmission work on the Escort. (Ex. 6.) The Plaintiff continued to undergo trouble with the vehicle and she continued to take it to The Car Store for repair about once each month until January of 2003.

In January of 2003, the vehicle would start and the Plaintiff could "rev up" the engine. However, the car would not exceed a speed of five miles per hour. Consequently, the Plaintiff again contacted The Car Store and it agreed to have the vehicle towed for repair. Thereafter, the Plaintiff had periodic phone conversations with Mr. Shockley and Mr. Brown, the store manager, regarding the apparent problems with the vehicle, her warranty and whether she could trade in the Escort for another vehicle. The Car Store held the Escort for a few weeks.

In February of 2003, the Plaintiff ceased making payments under the installment sales contract. In total, the Plaintiff paid $2,772.00 on the $6,918.75 contract price. On March 10, 2003 the Plaintiff received a notice that the vehicle had been repossessed. (Ex. 10.) The Car Store later sold the vehicle at a public auction and sought a deficiency judgment against the Plaintiff in the Justice of the Peace Court. The parties stipulated to dismiss that action, the Plaintiff filed her action in this Court, and the Defendants counter-sued for the alleged deficiency.

DISCUSSION

I. Decision on Defendants' Motion for Directed Verdict

At the conclusion of the Plaintiff's case in chief, the Defendants submitted a motion for directed verdict pursuant to CCP Civ. R. 50(a). The standard for a motion for directed verdict mirrors a motion for summary judgment. The Court must consider whether, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of

law. *Green v. Weiner*, 766 A.2d 492, 494 (Del. 2001). Upon viewing the evidence in the light most favorable to the Plaintiff, the Court finds that the Defendants are entitled to directed verdict on the consumer fraud and truth in lending counts.

Consumer Fraud

The Plaintiff testified that she was enticed to purchase the Escort from The Car Store, in part, because it promoted no-interest financing. She argues that, in spite of the no-interest offer, the Defendants inflated the price of the vehicle, thus, hiding an interest fee. Specifically, the Plaintiff argues that the National Automobile Dealers Association's ("NADA") published value of the 1996 Ford Escort at the time of purchase was $4,500. However, the Plaintiff agreed to purchase the vehicle for $6,495. The Plaintiff alleges that the difference between the NADA value and agreed price constitutes a hidden interest fee, which controverts The Car Store's representation, and according to the Plaintiff, constitutes a violation of Delaware's Consumer Fraud Act.

The Court takes notice that although all three of the Defendants are owned by the same people, they are recognized as three separate entities under Delaware law, and will be treated as such for purposes of this decision. The Plaintiff's allegation of consumer fraud stems from the agreement with The Car Store for the purchase and financing of the vehicle. Thus, the Court's analysis of the consumer fraud action will be limited to that transaction alone.

Pursuant to 6 *Del. C.* § 2525, a private person may institute a cause of action against a person or entity that violates 6 *Del. C.* § 2513. Section 2513 of Title 6 provides that it is unlawful for a person to employ any "deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission" when engaging in the sale or lease of any merchandise. The essence of a consumer fraud action 'is the making of a false or misleading statement or the concealment, suppression or omission of information, thereby

creating a condition of falseness.' *Ayers v. Quillen*, 2004 WL 1965866, *5-6 (Del. Super.)(citing *Brandywine v. Volkswagen, Ltd.*, 306 A.2d 24, 27 (Del. Super. 1973).

Mr. Johnson and Mr. Brown provided the Court with credible insight into the process by which The Car Store operates its business. They consistently testified that The Car Store purchases used vehicles at auction, and then sells and finances the vehicles to consumers. Mr. Brown routinely determines the consumer sale price for the vehicles sold by The Car Store to the general public. He testified that he considers several factors when identifying the consumer sale price, such as, the costs associated with purchasing and shipping the vehicle from auction, employee salaries, and other overhead costs like advertising and facility maintenance. Apparently, the NADA value of the vehicle is not considered in the calculation. Mr. Johnson and Mr. Brown also testified that The Car Store routinely assigns its finance agreements to DMAC at a 30% discount. According to Mr. Brown, The Car Store continues to make a profit off of the assignment, despite the discount, because it accommodates the discount within the calculation of the consumer sale price of the vehicles, in the same fashion that it considers other pricing factors.

The Plaintiff provided no evidence to substantiate her claim that the difference between the NADA value of her vehicle and the amount she agreed to pay was the result of a hidden finance charge. Logically, a consumer will pay a higher price for a vehicle sold by a retailer, like The Car Store, than they would otherwise pay if they purchased the same vehicle directly from auction. The evidence establishes that the principal amount of the debt was the consumer sale price of the vehicle. Furthermore, all of the Plaintiff's payments were directly applied to the principal amount of the loan. It is understandable that the Plaintiff may, in hindsight, feel that she agreed to pay too much money for the Escort. However, as defense counsel accurately points out, the law is not intended to remedy an unwise transaction unless a contractual or statutory right has been

violated. *See Passwaters v. Conway,* 1987 WL 19729, *3 (Del. Super.) The Car Store did not make any statement or omission that would create a condition of falseness. In fact, the evidence reflects that The Car Store's no-interest financing representation was entirely truthful and accurate. Therefore, the Defendants are entitled to judgment as a matter of law.

Truth In Lending Act

The Plaintiff asserts the same factual allegations in support of her argument that the Defendants breached the Federal Truth in Lending Act. The Plaintiff argues that The Car Store's practice of attributing the 30% discount that it afforded to DMAC upon assignment to the consumer sale price of the vehicle constituted an undisclosed finance charge.

Under the Act, creditors are required to disclose all finance charges. 15 *U.S.C.* § 1638. Finance charges are defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor *as an incident to the extension of credit*" (emphasis added). As discussed *supra*, the discount was but one factor considered when The Car Store determined the consumer sale price. The discount was not a cost applied to the principal as an incident to The Car Store's extension of credit to the Plaintiff. Thus, this Court finds that the discount did not constitute a finance charge under the Truth in Lending Act. Accordingly, the Defendants are entitled to judgment as a matter of law and the motion for directed verdict is hereby granted.

II. Decision After Trial

It is now incumbent upon the Court to determine the remaining causes of action. Three issues must be decided upon conclusion of the trial. First, the Plaintiff alleges that Premier is liable under theories of breach of express warranty and common law breach of contract. Additionally, the Plaintiff claims that The Car Store breached the implied warranties of merchantability and fitness for a

particular purpose. Finally, Defendant, DMAC, seeks a deficiency judgment against the Plaintiff in the amount of $3,679.27.

Breach of Express Warranty/Breach of Contract

The Plaintiff alleges that Premier is liable for damages under theories of both breach of express warranty, and common law breach of contract. Breach of express warranty is a cause of action that is recognized under the Uniform Commercial Code, thus, it is not applicable to the case *sub judice*. 6 *Del. C.* § 2-313. The UCC only applies to 'transactions in goods.' *Neilson Bus. Equip. Ctr., Inc. v. Monteloeone*, 524 A.2d 1172, 1174 (Del. 1987)(citing 6 *Del. C.* § 2-102). The Plaintiff's contract with Premier can only be characterized as a transaction for services. Accordingly, the Court finds that the breach of express warranty claim is inappropriate. Despite this finding, the Court concludes that the Plaintiff should succeed in her common law breach of contract action.

To succeed on her breach of contract action, the Plaintiff must establish three elements by a preponderance of the evidence. First, the Plaintiff must show that a contract existed between herself and Premier. Second, the Plaintiff must demonstrate that Premier breached an obligation under the terms of the contract. Finally, the Plaintiff must prove that she suffered damages as a result of the breach. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 600, 612 (Del. 2003).

There is no dispute that a contract existed between the Plaintiff and Premier. According to the terms of the contract, Premier promised to repair or replace a covered component of the vehicle in the event that there was a mechanical breakdown resulting from the normal use of the vehicle. (Def. Ex. 2.) The contract sets forth the components that are covered by the warranty; transmission and engine problems are listed as covered components. (Def. Ex. 2.) According to the evidence presented, the Plaintiff used her vehicle in an ordinary and normal fashion, namely, to travel back and forth to work, run errands, etc.

Thus, I find that throughout the time that the Escort was in the Plaintiff's possession, any problems that arose, were the result of normal use of the vehicle.

The first trouble that the Plaintiff experienced with the Escort involved problems with the engine. The Plaintiff concedes that Premier remedied the initial engine problem. However, in June 2002, approximately three months after the parties entered into the agreement, the Plaintiff began experiencing problems with her transmission. At that time, neither the mileage nor the time limitations had expired under the terms of the warranty. Thus, the warranty should have covered the repair or replacement of the transmission. The Court finds that the Plaintiff continued to experience significant problems with the transmission from June 2002 through January 2003, when the vehicle was towed for repair for the last time. Because problems with the transmission persisted, I conclude that Premier failed to properly repair or replace the problematic transmission, as promised under the terms of the contract. Accordingly, the Court finds that Premier breached the contract in June 2002.

Because the Court has determined that Premier breached the contract, it must now determine the appropriate damages. The traditional remedy for breach of contract is based upon the reasonable expectations of the parties. *Duncan v. Thera Tx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Expectation damages are measured by the amount of money that would put the non-breaching party in the same position as if the breaching party had not committed a breach. *Id*. The evidence shows that Premier breached the contract with ten months remaining under the twelve-month warranty. Thus, the Plaintiff is entitled to reimbursement for the value of the ten months of coverage that she would have received had Premier not breached. Thus, I find that the Plaintiff is entitled to $662.50. The Plaintiff also seeks to recover attorney's fees pursuant to 6 *Del. C.* § 4344. However, § 4344 applies only in the context of retail installment sales contracts and not to general service contracts like the one at hand. Additionally, the Court finds that the contract itself does not provide that the Plaintiff may collect

attorney's fees. Therefore, attorney's fees are not recoverable under the contract with Premier. *See Conventional Builders, Inc. v. Bethany, Inc.*, 1994 WL 45431, *1 (Del. Super.).

Breach of Implied Warranty

The Plaintiff is seeking damages against The Car Store for breach of implied warranties of merchantability and fitness for a particular purpose. 6 *Del. C.* §§ 2-313, 2-314. Because the transaction between The Car Store and the Plaintiff was for the sale of a good, the Uniform Commercial Code is applicable.

The Court does find that the Plaintiff properly proved her claim for breach of implied warranty of merchantability. Pursuant to 6 *Del. C.* § 2-313, unless the agreement between the parties states otherwise, a warranty of merchantability is implied in transactions between a merchant and a purchaser for the sale of goods. To be merchantable, a good must be fit for the ordinary purposes for which it was intended. 6 *Del. C.* § 2-314(2). To succeed on a breach of implied warranty of merchantability claim, the Plaintiff must establish (1) that a merchant sold her the vehicle; (2) that the vehicle was not merchantable at the time of the sale; (3) that the Plaintiff was damaged; (4) that the damage was caused by the breach of the warranty of merchantability; and (5) that the seller had notice of the damage. *Reybold Group, Inc. v. Chemprobe Tech., Inc.*, 721 A.2d 1267, 1269 (Del. 1998).

It is undisputed that The Car Store routinely engages in the business of selling used vehicles, thus, The Car Store is a merchant. *See* 6 *Del. C.* § 2-104.

The Plaintiff claims that the vehicle was defective because it failed to operate in accordance with the ordinary purposes for which it was intended. Specifically, the evidence establishes that the Plaintiff experienced numerous problems with the Escort due to engine and transmission problems that were present at the time of sale. In fact, the engine required total replacement less than two months after the sale, and, as discussed *supra*, the Plaintiff experienced persistent problems with the transmission for nearly seven months. Accordingly, I

find that the vehicle was defective, in that it had a defective engine and transmission, at the time of sale.

The Defendants raise a legitimate issue with respect to the second element of the merchantability analysis. The Defendants argue that the Plaintiff did not satisfy its burden of establishing that the vehicle was defective because she did not provide any expert testimony to that effect. The Defendants properly cite the Delaware Supreme Court's ruling in *Reybold* for the proposition that expert testimony is normally required to establish a defect in a breach of implied warranty of merchantability case. 721 A.2d at 1269. However, the Court also noted that some warranty claims do not require expert testimony, and further, that circumstantial evidence may be sufficient if it tends to negate other reasonable causes for the damage. *Id*. In light of the evidence that was presented, this Court finds that there were no other reasonable explanations for the damage caused than that the engine and transmission were indeed defective. This finding is buttressed by the repair records, which indicate that the engine had to be replaced, and that the transmission required continuous repairs, which eventually rendered the vehicle unusable.

The Court finds that the defects caused the Plaintiff proximate damage in that she was unable to use her vehicle for extensive lengths of time. Because the Plaintiff was unable to use the vehicle for normal daily transportation the Court concludes that the vehicle was not fit for the ordinary purposes for which it was intended. Lastly, I find that the Car Store was on notice of the defect as the Plaintiff testified that she had repeated conversations with agents of The Car Store regarding the defective engine and transmission. The Plaintiff's testimony was affirmed by the fact that Mr. Brown remembered talking with the Plaintiff regarding the problems she experienced with the vehicle. For the foregoing reasons, I find that The Car Store breached the implied warranty of merchantability and is liable to the Plaintiff for damages.

The measure of damages for a breach of the warranty of merchantability is calculated by determining "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." 6 *Del. C.* § 2-714(2). The Escort would have been worth the value that the Plaintiff actually paid for the vehicle, $2,772, if it had been merchantable. However, in its defective condition, the true value of the vehicle was $600, as established by the disposition value obtained by DMAC. (Ex. 14.) Therefore, I find that the Plaintiff is entitled to damages in the amount of $2,172. Although the Plaintiff seeks to recover attorney's fees, the sales contract does not provide that the Plaintiff may collect attorney's fees and there is no statute that provides for such damages. Accordingly, attorney's fees are not recoverable under the contract with The Car Store. *See Conventional Builders, Inc. v. Bethany, Inc.*, 1994 WL 45431, *1 (Del. Super.).

DMAC's Counterclaim for Deficiency Judgment

The parties neglected to present much evidence or argument with respect to DMAC's right to collect a deficiency judgment against the Plaintiff. However, the parties jointly submitted two documents, which indicate that the Plaintiff did not pay the balance of the secured loan. (Ex. 14, 15.) DMAC repossessed the Escort, sold it and applied the proceeds of the sale to the remaining balance on the secured loan. According to the calculation provided by DMAC, after the application of the proceeds, the Plaintiff owes a remaining balance of $3,679.72. The Plaintiff concedes that she stopped making payments on the Escort on the last occasion that it was towed for repair. Thus, DMAC seeks to have this Court enter a deficiency judgment in the amount of the remaining balance.

Sections 9-601 through 9-624 of Title 6 provide remedies and obligations applicable to a secured creditor in the event that a debtor defaults under the terms of the security agreement. Specifically, § 9-615 provides that if a secured party makes a proper disposition of the collateral and applies the proceeds to the secured debt, the debtor remains liable for any deficiency that remains. However, to make

a proper disposition, the debtor must first be in default. 6 *Del. C.* § 9-607. Thus, preliminarily, DMAC must establish that the Plaintiff was in default of the underlying security agreement, which was also the installment sales contract between the Plaintiff and The Car Store.

The contract states that the Plaintiff is deemed to be in default if she failed to perform an obligation that she agreed to perform under the terms of the contract. (Ex. 4, p. 3. ¶ 4.) Thus, DMAC alleges that when the Plaintiff failed to make payments, as stated in the contract, she was in default. However, as discussed *supra*, The Car Store breached the implied warranty of merchantability. Accordingly, when the breach occurred, the Plaintiff no longer had an obligation to perform under the terms of the contract. Therefore, the Plaintiff was never in default and DMAC is not entitled to enforce its security interest.

CONCLUSION

For the foregoing reasons, judgment is rendered in favor of the Plaintiff against The Car Store for breach of implied warranty of merchantability and the Plaintiff is hereby granted damages in the amount of $2,172. Additionally, judgment is rendered in favor of the Plaintiff against Premier for breach of contract and the Plaintiff is hereby granted damages in the amount of $662.50.

IT IS SO ORDERED this _____day of January 2006.

_____
Judge Rosemary Betts Beauregard